further assign his interest under the joint venture agreement with GP a month later?

(h) by virtue of the joint venture agreement with GP, TZ had in fact deposited the title with GP's solicitors and had agreed not to deal with the said land. The sale and purchase agreement on March 18, 1983 and the assignment of his interest on April 20, 1983 and now held null and void circumstances surrounding the sale and purchase illustrate the fraudulent interest of TZ not to honour his part of the bargain in the joint venture agreement with GP.

It is pertinent to note here that I felt that two of the matters raised by the respondents ought not to be given consideration. One was the issue of the different spacing and signatures and since the third respondent himself could not verify the authenticity of the originals, I held that this allegation should be disregarded. The other was the fact that TZ was in Singapore on the day the power of attorney was executed. I felt that exhibit WM-4 did not really establish this point.

It has been held in *Registrar of Titles, Johore* v. *Temenggong Securities Ltd.*[2] that the purpose of a private caveat is to preserve the *status quo* pending the taking of timeous steps by the applicant (caveator in this case) to enforce his claim to an interest in the land by proceedings in the Courts. The respondents had in fact filed an action for specific performance vide Kota Bharu Originating Summons No. 278/84 by either ZH or the administrators of TZ's estate on the joint venture agreement.

For the reasons given, it is abundantly clear that the applicant's grounds must fail in view of the fact that the respondents had a caveatable interest in the said land under the joint venture agreement and I held that the rights of the respondents to the said land ought to be protected by the caveat and accordingly dismissed the application to remove it with costs.

*Application dismissed.*

Solicitors: *Sri Ram Zulkifly & Kumar; Megat Najmuddin, Leong & Co.*

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## MALAYSIA OVERSEAS INVESTMENT CORPORATION SDN. BHD. v. SRI SEGAMBUT SUPERMARKET SDN. BHD.

**[O.C.J. (Siti Norma Yaakob J.) October 14, 1985]**

**[Kuala Lumpur – Civil Suit No. F.276 of 1985]**

*Contract – Performance guarantee – Injunction by plaintiffs restraining bank from payment – Application to dissolve injunction by defendants – No allegation of fraud – No serious issues – Balance of convenience – Dissolution of injunction.*

The plaintiffs obtained an *ex parte* interim injunction restraining Malayan Banking Bhd. (not a party to this action) from paying out a certain sum of money to the defendants in respect of a performance bond executed by the bank in favour of the defendants until the trial of this action. The plaintiffs had earlier entered into an agreement with the defendants to develop certain lands. Work on the project never got beyond the initial stages when the plaintiffs ran into financial difficulties in meeting their obligations under the agreement. As a result the defendants demanded payment of the sum of $1.5 million under the performance bond by a certain date. Upon the defendant's application to dissolve the injunction:

**Held:** (1) on the facts, the performance bond dated August 10, 1984, was payable upon demand by the defendants and as there was no allegation of any fraud, the plaintiff could not stand in the way of the defendants realizing the sum due under the performance bond. The dispute between the plaintiffs and the defendants on the main contract did not affect the right of the bank to make payment upon demand by the defendants;

(2) following *American Cyanamid* v. *Ethicon Ltd.*,[10] as there were no issues to be tried on the performance bond, the interim injunction should be dissolved, with costs to the defendants.

[*Editorial Note:* This decision is on appeal vide Rayuan Civil No. 285/85 dated September 19, 1985.]

*Cases referred to:*

(1) *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd. & Anor.* [1978] 1 Q.B. 159.
(2) *Howe Richardson Scale Co. Ltd.* v. *Polimex-Cekop and National Westminster Bank Ltd.* [1978] 1 Lloyd's Rep. 161.
(3) *Intraco Ltd.* v. *Notis Shipping Corporation* [1981] 2 Lloyd's Rep. 256; [1981] Com. L.R. 184.
(4) *Hong Kong Vegetable Oil Co. Ltd.* v. *Malin Sirinaga Wicker & Ors.* [1978] 2 M.L.J. 13.
(5) *Government of Pakistan* v. *Seng Peng Sawmills Sdn. Bhd. & Ors.* [1979] 1 M.L.J. 219.
(6) *Edison & Swan United Electric Light Co.* v. *Holland* (1889) 41 Ch. 28.
(7) *R.D. Harbottle (Mercantile) Ltd.* v. *National Westminster Bank Ltd. & Ors.* [1978] 1 Q.B. 146.
(8) *Ho Kok Cheong Sdn. Bhd.* v. *Lim Kay Tiong & Ors.* [1979] 2 M.L.J. 224.

(9) *David Hey* v. *New Kok Ann Realty Sdn. Bhd.* [1985] 1 M.L.J. 167.
(10) *American Cyanamid Co.* v. *Ethicon Ltd.* [1975] A.C. 396.

CIVIL SUIT.

*Darryl Goon* (*Teow Leong Wah* with him) for the defendants/applicants.

*S.P. Lim* for the plaintiffs/respondents.

*Cur. Adv. Vult.*

**Siti Norma Yaakob J.** : On May 28, 1985, the plaintiffs obtained an interim injunction on their *ex parte* application, restraining the Malayan Banking Berhad, who are not parties in this action, from paying out M$1.5 million to the defendants in respect of a performance bond dated August 10, 1984, executed by the Bank in favour of the defendants, until the trial of this action.

Following this, I dissolved the interim injunction upon application made by the defendants on the grounds that there are no serious issues to be tried and that the balance of convenience tilts in favour of the defendants that the interim injunction should not be allowed to remain.

The facts leading to this cause of action are as follows.

The plaintiffs entered into an agreement dated September 21, 1984, with the defendants to develop lands totalling about 130.39 acres into a new township in Cheras. The lands in question belonged to Dirga Niaga (Selangor) Sdn. Bhd. (to be referred to as "DN Co.") and to acquire the lands, the defendants entered into a prior agreement with DN Co. on February 22, 1983, purchasing such lands, but as separate titles have not yet been issued to them, the defendants' claim to the lands is that of beneficial owners only.

However, before the agreement dated September 21, 1984 was executed between the parties, the defendants insisted that the plaintiffs provide a performance guarantee to be executed by a Bank in favour of the defendants for the due performance of the agreement by the plaintiffs. Malayan Banking Berhad agreed to issue such a performance guarantee provided the plaintiffs execute a letter of indemnity in the Bank's favour idemnifying the Bank from any loss that may accrue by reason of the execution on the performance guarantee. All these conditions precedent appear to have been agreed upon, for on August 9, 1984, the plaintiffs executed a Letter of Indemnity in favour of Malayan Bank Berhad and on the following day, the Bank in turn executed a performance guarantee in favour of the defendants. The performance guarantee dated August 10, 1984, is valid for one year subject to renewal and becomes payable upon demand by the defendants. It was following the performance of these preliminaries that the plaintiffs and the defendants executed the main agreement on September 21, 1984.

Work on the project, however, never got beyond the infrastructure and earthworks stages when the plaintiffs ran into financial difficulties in meeting their obligations under the agreement and the upshot of this was that the defendants demanded immediate payment of the $1.5 million under the performance bond by noon of August 28, 1985. This caused the plaintiffs to apply and obtain an interim injunction on their *ex parte* application on the morning of May 28, 1985.

The first issue raised by the defendants is whether an injunction can lie against a performance guarantee or a performance bond. The law relating to performance bonds is amply set out in the case of *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd. & Anor.*[1] where the facts of the case are almost identical with the facts of the case before me. In that case the plaintiffs, English suppliers, contracted with Libyan customers to erect greenhouses in Libya and agreed that a performance guarantee for 10% of the contract price be issued by Barclays Bank International, an English Bank, and lodged with the Umma Bank in Libya. The contract, which was governed by Libyan law, provided that an irrevocable letter of credit payable at the English Bank was to be opened in favour of the plaintiffs. After the plaintiffs had given a counter guarantee to the English Bank, the latter on their own responsibility and on the plaintiffs' behalf gave a performance bond for £50,203/- to the Libyan Bank and confirmed that their guarantee was payable on demand without proof of conditions. The Libyan Bank then issued a guarantee bond for the plaintiffs for the same in favour of the Libyan customers. At the customers' request, the Libyan Bank then claimed £50,203/- under the guarantee from the English Bank. The plaintiffs obtained an interim injunction on their *ex parte* application to restrain the English Bank from paying the Libyan Bank. Kerr J. dissolved the injunction and his decision was affirmed by the Court of Appeal.

Lord Denning M.R. when dealing with the case referred to the number of guarantees that had been executed. The English suppliers guaranteed Barclays Bank International, Barclays Bank International guaranteed Umma Bank in Libya and the Umma Bank guaranteed the Libyan buyers. His Lordship also noted that

"the Libyan customers, before any contract was concluded stipulated that there should be a performance guarantee. It was to be a condition precedent to their entering into any contract at all... So even before the contract was actually signed the English suppliers agreed to arrange for a performance guarantee to be given for 10% of the contract price."

After going through the facts of the case, His Lordship concluded that

"the performance guarantee stands on a similar footing as a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relationship between the supplier and customer nor with the question whether the supplier has performed his contractual obligations or not nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand, if so stipulated, without proof of conditions. The only exception is where there is a clear fraud of which the bank has notice."

On the facts of the case before me, the performance guarantee dated August 10, 1984 valid for one year and subject to renewal, is payable upon demand by the defendants and as there is no allegation of any fraud, the plaintiffs cannot stand in the way of the defendants realising the sum under the performance bond. Admittedly there is a dispute between them on the main contract but that has nothing to do with the Bank and as such does not affect the right of the Bank to make payment upon demand by the defendants.

The same issue was also raised in the case of *Howe Richardson Scale Co. Ltd.* v. *Polimex-Cekop and National Westminster Bank Ltd.*[2] where the plaintiffs, sellers of goods, sought an injunction to restrain Polimex from claiming under a guarantee provided by National Westminster Bank Ltd. The Court of Appeal confirming Donaldson J.'s decision that an injunction should not be granted also held that

"the obligation to pay did not depend on the correct solution of a dispute as to the sufficiency of performance by the seller to the buyer or the buyer to the seller as the case might be under the contract. It would be quite wrong for the court to interfere with Polimex's apparent right under the guarantee to seek payment from the bank, because to do so would involve putting upon the bank an obligation to enquire whether or nct there had been timeous performance of the sellers' obligation under the sale contract."

The decision of this case was again followed in the case of *Intraco Ltd.* v. *Notis Shipping Corporation.*[3]

I now consider the relationship of the plaintiffs with the Bank and whether the plaintiffs had any legal or equitable right over the Bank that warrants the interim injunction being enforced until after the trial of this action. As I have stated above, the plaintiffs have not cited the Bank, a party to this action, as the Bank is not a party to the main contract which is in dispute and which forms the main claim in this action. As such, the plaintiffs have not asserted any claim against the Bank as can be seen in their Statement of Claim. But the plaintiffs have indemnified the Bank, but the Letter of Indemnity is not in issue and therefore has no relevance to the granting of the interim injunction. As the plantiffs have not shown that they have a legal or equitable right against the Bank, it follows that the interim injunction cannot continue to be enforced. To do otherwise would amount to giving me jurisdiction against third parties as if they were made defendants. See the cases of (1) *Hong Kong Vegetable Oil Co. Ltd.* v. *Malin Sirinaga Wicker & Ors.*[4] (2) *Government of Pakistan* v. *Seng Peng Sawmills Sdn. Bhd.*[5] (3) *Edison & Swan United Electric Light Company* v. *Holland.*[6]

The underlying fear of the plaintiffs appears to be that the Bank may insist on the indemnity, in which case, if that should happen, they may sue the Bank for damages. The same dilemma was faced by the plaintiffs in *R.D. Harbottle (Mercantile) Ltd.* v. *National Westminster Bank Ltd. & Ors.*[7] where Kerr J. held that "only in exceptional cases that the courts will interfere with the machinery of the irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in the clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contract by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce their claims, these are risks which the merchants take. In this case, the plaintiffs took the risks of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They must be allowed to be honoured free from interference by the courts.

Otherwise, trust in international commerce would be irreparably damaged."

The plaintiffs have also alleged that the contract is lacking in certainty as the layout plans do not identify the different lots of land on which construction works are to be carried out. If this is so, how were the plaintiffs able to carry out their feasibility studies, the infrastructure and earthworks that they had already done. Moreover they had been able to describe particulars of the various lots with certainty in the letter of indemnity. To that end, I consider that the plaintiffs have not been honest in their dealings and that the application for the interim injunction is but a ploy to prevent the defendants exercising their rights under the performance bond.

The plaintiffs have also alleged that the defendants had misrepresented themselves by passing themselves off as the owners of the lands, thereby, inducing the plaintiffs to enter into contractual obligations with them. Section 1.01 of the main contract spells out the fact that DN Co. are the registered proprietors of the land. Section 1.03 makes reference to a prior contract entered between DN Co. and the defendants whereby the latter agreed to purchase the lands from the former. Section 1.05 goes further to explain that separate documents of title have not yet been issued to the defendants and that the defendants' standing over the lands is that of beneficial owners only. That being the case, there is no truth in the plaintiffs' allegation of any misrepresentation on the part of the defendants on their status of ownership of the said lands.

Whilst alleging misrepresentation on one hand, the plaintiffs had also affirmed and performed part of their obligations under the contract by carrying out infrastructure and earthworks at the site and made payments pursuant to section 3.01(b) of the contract, facts that were not disclosed by them in their application for the interim injunction. This in itself is a ground for dissolving the injunction.

Lastly the plaintiffs plead that since the contract does not contain any provision relating to the obtaining of the approval of the Foreign Investment Committee (FIC), the contract is void and unenforceable. Reference to the FIC approval must mean the "Guidelines for the Regulation of Acquisition of Assets, Mergers and Takeovers," issued by the Government in 1974 and whether such Guidelines apply to this contract must depend on whether the parties have agreed to such Guidelines being made a term of the contract. There is no evidence to that effect and in any case the Guidelines have been held to have no force of law whatsoever but are of advisory character only and non-compliance whatsoever will have no effect as to the legality or otherwise of the contract. See the cases of *Ho Kok Cheong Sdn. Bhd. & Anor.* v. *Lim Kay Tiong & Ors.*[8] and *David Hey* v. *New Kok Ann Realty Sdn. Bhd.*[9]

Following the *American Cyanamid's* case[10] as there are no issues to be tried on the performance bond, and in the event the Bank acts on the indemnity in which case, the plaintiffs would be adequately compensated in damages, I had dissolved the interim injunction and granted costs to the defendants/applicants.

*Order accordingly.*

Solicitors: *Mah Kok & Din; S.P. Lim & Koh.*

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## DIRECTOR GENERAL OF INLAND REVENUE v. OOI GUAN HOE

**[A.C.J. (Mohamed Dzaiddin J.) July 12, December 26, 1985 & January 15, 1986]**

**[Penang – Tax Appeal No. 1 of 1983]**

*Revenue Law – Devolution of real properties to administrator on death – Transfer by administrator to beneficiary – Sale by beneficiary – Acquisition date – Bare trustee – Tax payable – Whether interest payable on overpayment of tax – Real Property Gains Tax Act, 1976, s. 12; Schedule 2, paras 2, 3(a), 4(3), 15 & 28 – National Land Code, 1965, s.215 – Income Tax Act, 1967, Schedule 5, para 34.*

In this tax appeal by the Revenue by way of case stated against the decision of the Special Commissioners, two questions requiring decisions, *viz.* the date of acquisition and whether paragraph 28, Schedule 2, of the Real Property Gains Tax Act, 1976, applies in this case. The respondent is the administrator of his father's estate as well as its sole beneficiary. After the death of the deceased (who died in 1941) the subject properties were transferred to the respondent as administrator. The issues arose when the ownership of the properties was transferred by him as administrator to himself as the beneficiary. They were registered in his name as the new owner on September 4, 1975. On December 18, 1978 *i.e.* 4th year after acquisition on September 4, 1975) the respondent sold the properties to a purchaser for $160,000. The properties were valued at $128,000 as at September 4, 1975.